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No. 05-

IN THE

Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a permanent felony disenfranchisement provision – like all other voting qualifications – subject to challenge under Section 2 of the Voting Rights Act on the ground that it results in a denial of the right to vote on account of race?

2. When a provision was enacted by a state for the purpose of disqualifying otherwise eligible black voters, and it has disenfranchised blacks at twice the rate of others for more than one hundred years, does the state bear the evidentiary burdens of production and persuasion in proving that it reenacted the provision for an independent, nondiscriminatory reason sufficient to purge its unconstitutional taint?

PARTIES TO PROCEEDING

Petitioners are eight Florida citizens – Thomas Johnson, Derrick Andre Thomas, Eric Robinson, Omali Yeshitela,[1] Adam Hernandez, Kathryn Williams-Carpenter, Jau'dohn Hicks, and John Hanes – who were plaintiffs in the district court. They brought this suit in their own right and as representatives of a certified class. The class consists of more than 613,000 Florida citizens who have fully served sentences of incarceration, probation, or parole on felony convictions, but who, under Florida's felony disenfranchisement provision, remain barred from voting for life or until granted discretionary executive clemency.

The State Respondents are the members of Florida's Clemency Board – Jeb Bush, Governor; Katherine Harris, Secretary of State; Robert Butterworth, Attorney General; Robert Milligan, Comptroller; William Nelson, Treasurer; Robert Crawford, Commissioner of Agriculture; and Thomas Gallagher, Commissioner of Education – in their official capacities. They were defendants in the district court and appellees in the court of appeals. The County Defendants are Beverly Hall, Jane Carroll, Pam Iorio, David C. Leahy, William Cowles, and Deborah Clark, the county supervisors of elections for Alachua, Broward, Hillsborough, Miami-Dade, Orange, and Pinellas counties, respectively, in their official capacities. The district court certified a defendant class of county election supervisors, who abated their participation in the case pending the determination of liability.

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[1] On January 17, 2001, the district court dismissed Omali Yeshitela, whose civil rights had been restored.

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Brown v. Bd. of Sch. Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir. 1983) 29

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Cases – Continued:

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S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 *et seq.* 17, 18, 19

Miscellaneous:

David A. Bositis, *Black Elected Officials: A Statistical Summary 2001* (Joint Ctr. for Political & Econ. Studies 2003), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf 20

Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* (2005), *at* http://www.sentencingproject.org/pdfs/barredforlife.pdf 13

The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), *at* http://www.sentencingproject.org/pdfs/1046.pdf 3

Jerrell H. Shofner, *The Constitution of 1868*, Florida Hist. Q., Apr. 1963, at 374 4

U.S. Comm'n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, ch. 5 (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm 20

PETITION FOR A WRIT OF CERTIORARI

Thomas Johnson *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Eleventh Circuit is reported at 405 F.3d 1214 (11th Cir. 2005) (en banc) (Appendix to Petition ("App.") at 1a). The panel opinion that was vacated by the en banc court is reported at 353 F.3d 1287 (11th Cir. 2003) (App. 86a), *vacated by* 377 F.3d 1163 (11th Cir. 2004) (en banc) (App. 84a). The opinion of the district court is reported at 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (App. 150a).

JURISDICTION

The Court of Appeals entered judgment on April 12, 2005. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4). On July 1, 2005, Justice Kennedy granted petitioners' motion to extend their time to file this petition to and including August 10, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the United States Constitution are reproduced in the Appendix (App. 186a-88a).

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is reproduced in the Appendix (App. 189a).

Three provisions of various Florida Constitutions are reproduced in the Appendix: the current felony

disenfranchisement provision, Fla. Const. art. VI, § 4 (1968) (App. 192a); its predecessor provision, Fla. Const. of 1868, art. XIV, § 2 (App. 190a); and an additional provision pertaining to criminal disenfranchisement that was omitted in 1968, Fla. Const. of 1868, art. VI, § 5 (1885) (App. 191a).

INTRODUCTION

This is a class action on behalf of more than 613,000 citizens of Florida who are barred from voting unless and until they receive discretionary clemency, although they have served their felony sentences. Petitioners challenge the Florida Constitution's felony disenfranchisement provision under the Voting Rights Act ("VRA") and the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States District Court for the Southern District of Florida granted summary judgment in favor of the State on both the statutory and the constitutional claims. A divided panel of the Court of Appeals for the Eleventh Circuit reversed, but the en banc court later vacated the panel opinion and affirmed summary judgment for the State. Two issues are presented: (1) whether Florida's felony disenfranchisement provision, which has disproportionately denied the right to vote to African-Americans for more than one hundred years, is subject to challenge under the VRA; and (2) whether the constitutional challenges to the provision survive, despite its reenactment without explanation in 1968, because it was originally enacted for the purpose of suppressing black political participation and has consistently achieved that result.

In 1868, following the Civil War, the abolition of slavery, and Florida's readmission to the Union, Florida enacted a new constitution. A crucial component of this constitution was a provision permanently disenfranchising people with felony convictions unless their civil rights were restored through an executive act of grace. Fla. Const. of